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IN THE

Supreme Court of the United States

OCTOBER TERM 1929.

No. 48

AMERICAN FRUIT GROWERS, INC., *Petitioner*,

vs.

BROGDEX COMPANY, *Respondent*.

BRIEF FOR RESPONDENT IN REPLY TO AMICI CURIAE.

CHARLES NEAVE,
MELVILLE CHURCH,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM 1929.

No. 667.

AMERICAN FRUIT GROWERS, INC., *Petitioner*,

vs.

BROGDEX COMPANY, *Respondent*.

BRIEF FOR RESPONDENT IN REPLY TO AMICI CURIAE.

With reference to the briefs sought to be filed by several parties *amici curiae*, we desire to draw the attention of the Court to certain points which we believe should be kept clearly in mind. To some extent this may involve a repetition of points which have already been made in respondent's brief in opposition to the petition for certiorari but which will bear elaboration.

There is a concerted effort here to make it appear to this Court that a question of great public importance

is presented for review. We submit that the record amply establishes the contrary.

In effect, these parties represent to the Court that there is no way by which the public can tell whether it infringes or not; that the patent purports to take away from the public and to monopolize something long previously enjoyed by the public; that, in short, the patent sustained by both lower courts after most thorough consideration and without a dissenting voice, constitutes a strangle hold upon the fresh fruit supply of the country and a sinister threat to every American breakfast table.

Now what are the facts as shown by the record? Do they support such contentions? Unquestionably they do not.

Long prior to 1923 the citrus fruit industry had attained very large proportions, many millions of boxes annually being packed and shipped to market from Florida and California (Tr., Vol. II, pp. 49, 93-4, 399). A well defined packing house practice had been built up and used for years. It emphasized and embodied all that the art then knew of how to ensure arrival of fresh fruit in market in the best condition. That there was available to the public under that practice an ample supply of oranges and grapefruit will hardly be denied.

Blue mold decay was a recognized serious problem from the first. Eminent experts, including those of the Department of Agriculture, labored long and arduously to overcome it. The net result of years of investigation was the recommendation, repeatedly emphasized in a

long series of Department bulletins and other published official communications to the industry appearing during the twenty years next preceding 1923, to handle the fruit with extreme care and to delay unavoidable decay through refrigeration. These remedies, and no others, were what the industry was taught and what it believed in (*e. g.* Tr., Vol. II, 36-7, 69-76, 105-7, 136-7, 153-5, 184-7, 190, 255-6, 301, 329, 370, 463, 555, 560, 622).

During all this time, the experts, including those of the Department of Agriculture, were declaring over and over again that it was hopeless to try to check blue mold decay in fresh fruit by chemical treatment, because it had been tried and had failed. (Tr., Vol. II, pp. 79, 123, 236, 265, 290, 309, 339-40, 440.)

But, beginning in the fall of 1924, the whole scene suddenly changed. The Department of Agriculture began publishing bulletins and official communications telling the industry how remarkably efficient borax treatment was for solving the long-standing problem of blue mold decay. (Tr., Vol. II, 649, 657, 660, 671, 673, 685.) The reason for this is apparent when it is recalled that, in the fall of 1923, this respondent had already demonstrated the borax treatment in semi-commercial tests in Tulare County, California, which were witnessed by Barger, a representative of the Department of Agriculture. (Tr., Vol. I, pp. 297-303.) This same Barger later (January, 1924) also observed the treatment in regular commercial use at Walnut, California, by one of respondent's licensees. (Tr., Vol. I, pp. 303-4.) There followed issuance of patents to Barger and others of the Bureau of Plant Industry, De-

partment of Agriculture, on various specific phases of the borax treatment, all applied for long after respondent had introduced the invention of the patent into commercial practice as aforesaid. (Tr., Vol. II, pp. 709, 713, 715, 717.)

Thus, until 1924, the art was led by all the accepted art teachings directly away from the invention of the patent in suit. Yet the Department of Agriculture, which was foremost in condemning chemical treatment of fresh fruit in the packing house for control of blue mold decay as worse than useless even to attempt, now contends that the sustaining of this patent by the Courts below raises a question of vital importance to the public.

Why so? The public never knew of the invention prior to 1924, and yet it was always well supplied with oranges. It can be so supplied today, just as formerly, without let or hindrance on the part of this respondent, by packers and shippers who feel that the old practice is good enough.

To argue that, because the presence of applied borax on the rind of borax-treated fruit is usually perceptible only upon chemical examination, there is imposed upon dealers and consumers an undue burden of inquiry, amounts in the last analysis to contending that nothing is patentable whose distinguishing characteristics are determinable only by the making of some technical test, whether it be chemical or otherwise, not readily performed by every ultimate consumer or user. The inherent fallacy of such an argument is obvious. Furthermore, the question is wholly a moot one here, since the petitioner-defendant was perfectly well aware

of what it was doing when it infringed. Moreover, in situations where it appears that dealers have "innocently" infringed, equity courts may be relied upon to do justice in the future, as they have in the past, by merely enjoining continued infringement.

While the efforts of the petitioner and parties *amici curiae* to ensure a review of this case on certiorari eloquently attest the great importance of the patented invention as an outstanding advance in the art to which it pertains, we submit that they wholly fail to make out a situation characterized by general public importance in the sense apparently regarded heretofore by this Court as warranting such review of a patent case.

Respectfully submitted,

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March 12, 1930.